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In The Supreme Court of the United States

OCTOBER TERM, 1993

JANICE FARLEY *ET AL.*, *Petitioners,*

v.

COMMISSIONER OF THE MAINE DEPARTMENT OF HUMAN SERVICES AND THE MAINE DEPARTMENT OF HUMAN SERVICES,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

A. Introduction

The Respondents' Brief in Opposition is deeply flawed by misreadings of relevant precedent, in particular this Court's opinions in *Bowen v. Gilliard*, 483 U.S. 587 (1987) and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990) as well as the decision in *Bennett v. White*, 671 F.Supp. 343 (E.D.Pa 1987), *aff'd in part*, 865 F.2d 1395 (3rd Cir. 1989), *cert. denied*, 492 U.S. 920 (1989). Notwithstanding the Respondents' rhetorical device of characterizing the child support payments in dispute as AFDC benefits, there is no controlling precedent, and the issues raised by this Petition are likely to continue to create conflict until resolved by this Court.

B. The *Gilliard* Decision Does Not Address the Present Controversy And Does Not Hold that a Custodial Parent Has No Property Interest In Child Support Rights.

This Court, citing *Layton v. Layton*, 263 N.C. 453, 456, 139 S.E. 2d 732, 734 (1965) (child support obligation does not continue after the death of the responsible parent and is not a debt of the estate), stated in *Gilliard* that "the child receiving support payments holds no vested protectable expectation that his or her parent will continue to receive identical support payments...." 483 U.S. at 607. The Respondents leap from this undisputed point to the illogical and specious conclusion that "...an AFDC recipient holds no

property interest cognizable under the takings clause...even *prior* to the statutory assignment of such rights to the State..." (emphasis in original). Respondents' Brief in Opposition at 7. This Court's observation about future child support does not in any way suggest that a parent or child has no property interest in accrued or ongoing child support payments.

A custodial parent's interest in child support has deep and long-standing roots. *See*, e.g., *Dunbar v. Dunbar*, 190 U.S. 340 (1903) (child support obligation not discharged by bankruptcy) and *Gilley v. Gilley*, 79 Me. 292, 9 A.263 (1887) (common law allowed mother to maintain action of assumpsit for child support). The Supreme Judicial Court has very recently reiterated "that the 'right to the payment of child support becomes vested as it becomes due'". *Allen v. Allen*, ___ A.2d ___, Docket No. Oxf-92-478 (Me.) (Slip Op. August 13, 1993) (citations omitted). This is certainly the type of economically valuable interest which, albeit subject to modification, is protected by the Takings Clause.[1]

The Respondents also argue, as anticipated,[2] that any property interest that may exist in child support is extinguished by the AFDC parent's assignment of rights to the State. The statutory scheme simply does not support this contention, and it is a "cardinal rule [of construction] that a statute is to be read as a whole...since the meaning of statutory language, plain or not, depends upon context." *King v. St. Vincent's Hospital*, 502 U.S. ____, 112 S.Ct.

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[1]*See* Peterson, *The Takings Clause: In Search of Underlying Principles--Part II--Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL.LAW REV. 53, 62-63 (1990).

[2]See the Petition for Writ of Certiorari in this action at 10-14.

570, 116 L.Ed.2d 578, 586 (1991). The support enforcement statutes clearly provide for the distribution of some child support to the custodial parent even after the assignment. The Petitioners' prior reference to a "contract" (quotations in original)[3] is also relevant to a proper construction of the statute, since the term assignment derives from the law of contracts. The statutory provision at issue is more analogous to a partial assignment than to an unconditional assignment.[4] The *Gilliard* decision merely upholds the validity of the required assignment. It does not address its scope and should not serve as a shield for the State's unlawful retention of child support.

C. This Court's Holding in *McKesson* Provides an Appropriate Basis for Review of the Petitioners' Due Process Claim.

The Respondents contend that the Petitioners' due process claim is foreclosed by this Court's decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Citing a footnote, they also argue that the *McKesson* opinion turns on a waiver of state sovereign immunity and is thus distinguishable from the present case. These contentions miss the mark.

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[3] *Id.*

[4] The Maine Supreme Judicial Court has acknowledged in another context that an AFDC parent has an interest in child support separate and distinct from the State's. *See Department of Human Services v. Vining*, 617 A.2d 555 (Me. 1992). (Affirming the dismissal for lack of prosecution of a paternity action brought by the State, as to the State, but remanding for possible prosecution by the custodial parent).

This petition arises out of two separate cases, later consolidated in the Maine Superior Court, which raised various federal and state constitutional and statutory claims, including claims pursuant to the Due Process Clause and 42 U.S.C. §1983. As the Petitioners noted below,[5] the Supreme Judicial Court was authorized to rule in the class's favor on constitutional grounds alone, even if *Will* interposed a barrier to a Section 1983 claim. Indeed, both the Superior Court and the Supreme Judicial Court addressed the due process claims directly without reference to *Will*. The *McKesson* decision clarifies that the Due Process Clause by itself can provide a basis for retroactive monetary relief against a state.

The *McKesson* opinion also reaffirms certain fundamental points, in particular that: 1) "the Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from State Courts", 496 U.S. 31, and 2) the Due Process Clause requires the States to provide either a predeprivation hearing or a postdeprivation process that offers meaningful retroactive relief. This Court recently affirmed its commitment to *McKesson* in *Harper v. Virginia Department of Taxation*, 61 U.S.L.W. 4664, 4667-4668 (June 18, 1993).

The complainants in *McKesson* objected to a Florida tax on Interstate Commerce Clause grounds and sought the return of taxes already paid through a state refund suit. While agreeing with the taxpayers' challenge, Florida's highest Court declined to authorize a refund, citing "equitable" considerations, *i.e.* the State's supposed good faith reliance on a presumptively valid statute and the

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[5]Reply Brief of Appellants in *Farley v. Department of Human Services*, 621 A.2d 404 (Me. 1993).

likelihood that the taxpayers had been able to pass their costs on to consumers and thus would reap a "windfall". This Court reversed and directed Florida to provide relief to the taxpayers while giving the State considerable latitude in fashioning a remedy. The Court's discussion of the "pass-on" defense includes an observation in a footnote that the State had waived sovereign immunity by authorizing a state refund action. 496 U.S. 219, n.34. The Court further notes that it need not consider whether a "pass-on" defense might be an appropriate limitation on the waiver of sovereign immunity, since the "respondents misdescribe state law." *Id.* Taking this footnote out of context, the Respondents offer the sweeping and untenable claim that a state can defeat federal constitutional imperatives merely by asserting state sovereign immunity, in effect providing neither a predeprivation nor a postdeprivation remedy. This assertion stands logic on its head and would make the Court's lengthy discussion in *McKesson* pointless.

As the author(s) noted in *The Supreme Court, 1989 Term*, 104 HARVARD LAW REV. 40, 192 (1990).

> *McKesson* marks an important step in the Court's evolving approach to ensuring adequate remedies for state violations of constitutional rights. Some form of federal remedy is necessary to guarantee the enforcement of constitutional rights because state remedial jurisdictional principles may limit the availability of relief under a state cause of action, even if brought to enforce federal rights.

While the *McKesson* decision provides the states with considerable flexibility in fashioning remedies for

unconstitutional deprivations, it also makes clear that a state can not refuse to provide any remedy. *Id.* at 195, n.65.

Further, the Respondent's argument defines not only logic but also the facts of this case. The Maine Superior Court expressly found that the State's failure to give the Petitioner class appropriate notice and an opportunity for a hearing violated the Maine Administrative Procedure Act as well as the Due Process Clause.[6] The Respondents never appealed or cross-appealed this decision. The Petitioners' situation is thus analogous to that of the taxpayers in *McKesson*, *i.e.* they were authorized to seek judicial review under Maine law, but the Maine courts unduly circumscribed the remedies available to them. Unlike the class members in *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd sub. nom. Maine v. Thiboutot*, 448 U.S. 1 (1990), the petitioners never had any prior opportunity for a meaningful hearing. The *McKesson* decision is an appropriate basis for requiring the Respondents to provide such a hearing.

D. The Issues Presented by this Petition Generate Continuing Controversy.

The Respondents attempt to deflect the Court's attention from the controversy at hand by pointing out that the statutory provision of 42 U.S.C. § 657(b)(1) at issue in *Wilcox v. Ives*, 864 F.2d 915 (1st Cir. 1988), was superseded by a 1988 amendment.[7] They neglect to note that the 1988

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[6]See the Petition for Writ of Certiorari in this action at 17a-19a.

[7]The Respondents cite a statement in Judge Breyer's concurrence in *Wilcox* to the effect that the 1988 amendment essentially adopted the original position of the U.S. Secretary of Health and Human Services (emphasis added). With all

amendment itself has generated conflict. *See* e.g., *Levesque v. Sheehan*, 821 F.Supp. 779 (D.Me. 1993) and *Kenyon v. Sullivan*, 761 F.Supp. 95 (D.R.I. 1991). They also offer no principled basis for distinguishing the payments at issue here from those involved in the *Bennett* case.

The only real distinction offered between this action and *Bennett* is the Respondents' alleged good faith compliance with federal regulations.[8] Good faith is not a defense to a takings claim, however, and indeed the Respondents can offer no case law authorizing such a defense. This argument also overlooks the fact that Pennsylvania officials also claimed to be acting in good faith. *Bennett v. White*, 865 F.2d at 1400. Most importantly, the Respondents' basic defense, that custodial parents have no interest in child support cognizable under the Takings Clause even before the assignment of rights to the State, sweeps so broadly as to encompass not only the *Bennett* class but also custodial parents who have never received AFDC but have asked the State to collect their support. The State's perspective on this controversy almost guarantees continuing conflict.

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due respect, the Petitioners submit that this is simply not an accurate statement. Judge Bownes noted various circumstances in which class members lost the $50.00 child support payment as a result of the Secretary's construction. 864 F.2d at 917, 922-924, *e.g.*, delays caused by employers, interstate transfers, by intra- state bureaucracies, and by the responsible parents themselves. The 1988 amendment adopted the Secretary's position only with respect to the responsible parents.

[8]The Respondents' claim of faithful adherence to the federal regulation and then to the *Wilcox* final injunction are not entirely consistent with the record below or the record in *Wilcox*.

E. Conclusion

For the reasons previously set forth and stated above, the Petitioners urge this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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